No. 4286

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOBBS WALL & COMPANY,
(a corporation),
Plaintiff in Error,

vs.

S. PETTERSON,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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I.

STATEMENT OF FACTS.

Plaintiff (defendant in error herein) brought this action for an injury to his right arm, received from the fall of a block on the Steamer "Crescent City", owned and operated by defendant (plaintiff in error herein), on which plaintiff was serving as second mate.

The complaint alleged unseaworthiness of the vessel and consequent negligence of the defendant, and counts solely on the alleged fact that the block which was hooked into an eye attached to an iron band around the main mast about a foot or two

from the top, did not have a nosing or seizing across the mouth of the hook so as to prevent the block from unhooking from the eye.

The answer presented a general denial to this specification of unseaworthiness and negligence, and also an additional defense to the effect that the block was jarred out of said eye and caused to hit plaintiff, solely by his own negligence due to the fact that in trying to untangle the donkey fall from the midship guy he operated the winch on said vessel too violently and caused the main mast to shake to such an extent that the block was thereby jarred out of the eye and caused to fall.

The case was tried by the court without a jury, a jury having been duly waived by written stipulation filed with the clerk (Tr. p. 12).

At the conclusion of the trial defendant made a motion for a judgment in its favor on the ground that the evidence was insufficient to justify a judgment for the plaintiff, and further that the evidence showed that the accident was caused by the negligence of the plaintiff himself. The court did not rule on the motion at that time, but reserved it for determination along with the whole case. This action of the court and its failure to grant the motion, was excepted to by defendant as appears in the bill of exceptions (Tr. p. 59). Subsequently the court awarded plaintiff a judgment for $2850.00, from which judgment defendant prosecutes this writ of error.

It was admitted that on a block in use on board ship it is customary and proper to have a nosing of rope yarn, marlin or wire tied across the mouth of the hook, in order to prevent the hook from jarring out of the eye.

At the trial plaintiff stated that the hook on the block which hit him did not have a nosing across it when the block fell (Tr. p. 36), but on cross-examination admitted that he actually had not looked to see whether or not it had such nosing, either at the time it fell (Tr. p. 41) or at any time prior thereto (Tr. p. 40). No other witness testified on behalf of plaintiff as to this matter.

Plaintiff admitted that it could be determined by an inspection of the block whether there had been a nosing, because there would be a mark where the nosing was tied around the hook, particularly since the block had been painted a few months prior to the accident and the space covered by the nosing naturally would reveal an unpainted surface (Tr. pp. 36, 49-50).

The particular block which fell and hit plaintiff was introduced in evidence (Tr. p. 51). Upon examining this block plaintiff admitted that it bore marks where the nosing went around the hook (Tr. p. 42). Captain Butzig, the master of the "Crescent City", testified to the same effect (Tr. pp. 49-50). Plaintiff introduced no contradictory evidence.

It was shown that, at the time of the accident, there was on board the "Crescent City" the proper

material with which to place a nosing around the hook of this block if necessary, and that if plaintiff had seen such a nosing was missing it was within his province as second mate to have the same replaced. No one at any time had reported that the hook had no nosing around it (Tr. p. 49).

Although the complaint alleged that the block in question was an unused one, defendant proved that it had been used both for a signal halyard and in painting the main mast just a few months before the accident happened (Tr. pp. 35, 40-41, 50).

At the time of the accident the "Crescent City" was at North Bend, Oregon, taking on a cargo of lumber for San Pedro. The loading of the lumber had been completed and the vessel was being made ready for sea, under the direction of plaintiff as second mate; the captain and first mate were ashore. The cargo booms on the foremast had already been lowered to the deck by plaintiff and some of the crew, and they were proceeding to lower the booms on the main mast. S. Sorenson, a seaman on the "Crescent City", who witnessed the accident, testified on behalf of defendant that in lowering these booms the cargo hook had become entangled in the midship guy and that plaintiff took the levers of the winch and jerked the hook from one side to the other, until it became disentangled and that in so operating the winch plaintiff caused the mast to shake (Tr. p. 47); that, at the time the block fell and hit him, plaintiff was standing with the levers of the winch in his hand (Tr. p. 55); that a man

could have climbed up and unhooked the entanglement (Tr. p. 47); that one Delquist, another member of the crew, was in the rigging at the time, ready to do so (Tr. p. 48). Thomas Selfridge, chief engineer on the "Crescent City", also called by defendant, testified that he was in his room, thirty feet away at the time the accident happened, and that he could feel the vibration caused by the operation of the winch, and that it was being operated very violently, and that the mast was being jerked very considerably, and that he could hear the plaintiff swearing; that the vibration was very much more than would be caused by merely taking up the slack on the line (Tr. pp. 53-54).

Plaintiff admitted he operated the winch to draw the line up and get the cargo hook up in the air and out of the way (Tr. p. 43); also that when the block hit him his arm was on the winch, but did not remember whether it was on the lever or on top of the cog wheels (Tr. p. 56). He denied that he had used the winch in an effort to jerk the line loose (Tr. p. 43), but did not remember whether or not when he hoisted the cargo hook it became entangled with the midship guy (Tr. p. 43). He admitted some sailor wanted to go aloft and he told him, "No, it is not necessary, because the hook is not used" (Tr. p. 44). No other witness testified on behalf of plaintiff as to how the accident happened.

It was admitted that the block was not used in raising and lowering the booms and had no connection at all with such operation. The evidence also

showed that when the winch is used in loading and unloading the vessel the mast is caused to shake more or less, and that such shaking of the mast might possibly break the nosing and cause the block to fall. It was also testified that, if plaintiff operated the winch violently, thereby causing the mast to shake, the nosing might break and the block unhook and fall (Tr. p. 50); that it would take considerable shaking to jar the hook of the block out of the eye, even if the nosing had broken off (Tr. p. 50).

II.

SPECIFICATION OF ERRORS RELIED UPON.

The error which defendant specifies and relies on for a reversal of the judgment is the refusal of the court to grant defendant's motion made at the conclusion of the trial that judgment be entered in its favor, on the ground that the evidence was insufficient in law to warrant a finding for the plaintiff, and further that the evidence shows that the accident was caused by the negligence of the plaintiff himself. This motion should have been granted because the burden was on plaintiff to prove that the vessel was unseaworthy or defendant negligent, in that there was no nosing around the hook of the block which fell and struck plaintiff, but plaintiff did not offer any evidence to prove such unseaworthiness or negligence except the bare fact that the block fell, and plaintiff failed to sustain such

burden of proof which was upon him. On the other hand, defendant's evidence showed that said hook did have a nosing around it and further that the block was caused to fall and plaintiff was injured solely as a result of his own negligence in operating the winch too violently, thereby shaking the mast to which said block was attached by a band and causing the hook to slip out of the eye on said band, with the result that the block fell and injured him (Assignments of Error No. II and III, Tr. pp. 65-66).

III.

OUTLINE OF ARGUMENT.

A.

The question whether the evidence is sufficient in law to justify a judgment for plaintiff is properly before this court for review.

B.

The burden of proving that there was no nosing around the hook was on the plaintiff, but he introduced no evidence other than the fact that the block fell and hit him. Defendant, however, introduced evidence to show there was a nosing around the hook and furthermore that the accident was caused by the plaintiff's own negligence. Plaintiff utterly failed to sustain the burden of proof, and the court should have granted defendant's motion for judgment.

C.

A review of cases involving injuries to seamen with facts similar or comparable to the facts of this case compels the conclusion that plaintiff failed to prove a cause of action herein and judgment should have been awarded to defendant.

D.

It is a general rule of law that negligence cannot be surmised or conjectured or left to speculation from the happening of an accident, and that in the absence of facts establishing negligence the court must award defendant judgment. This rule is directly applicable to this case.

E.

Plaintiff cannot claim herein the benefit of the doctrine of *res ipsa loquitur* because it is ordinarily not applicable in actions by seamen for injuries received on account of the unseaworthiness of the vessel or the negligence of the owners, or in cases of master and servant generally, and even if the doctrine could apply it would not apply in this case as defendant introduced evidence explaining the cause of the accident which evidence was not overcome by plaintiff.

IV.

ARGUMENT.

A.

The Question Whether the Evidence is Sufficient in Law to Justify a Judgment for Plaintiff is Properly Before this Court for Review.

As heretofore stated, the defendant, at the conclusion of the trial, moved that judgment be entered in its favor on the ground that the evidence was insufficient in law to warrant a finding for the plaintiff, and that the evidence showed that the accident was caused by plaintiff's own negligence. The court then stated that he would take the motion under consideration and determine the whole matter at one time, to which defendant excepted. The court's refusal to grant the motion also was duly assigned as error in the assignment of errors filed by defendant. By such motion, exception and assignment of error, defendant has preserved for review by this court the question whether the evidence is sufficient to show unseaworthiness of the vessel or negligence on the part of the defendant for which it is liable. *Town of Martinton v. Fairbanks,* 112 U. S. 670, 28 L. Ed. 862; *Societe Nouvelle D'Armement v. Barnaby,* 246 Fed. 68; *Stoffregen v. Moore,* 271 Fed. 680. If it is shown that there was no evidence to justify a judgment against defendant, the court erred in denying defendant's motion for judgment, and the judgment in favor of plaintiff must be reversed by this court.

B.

The Burden of Proving That There Was No Nosing Around the Hook Was on the Plaintiff, But He Introduced No Evidence Other Than the Fact That the Block Fell and Hit Him. Defendant, However, Introduced Evidence to Show There Was a Nosing Around the Hook and Furthermore That the Accident Was Caused by Plaintiff's Own Negligence. Plaintiff Utterly Failed to Sustain the Burden of Proof, and the Court Should Have Granted Defendant's Motion for Judgment.

The following cases establish conclusively that in this action by a seaman to recover indemnity for injuries due to the alleged unseaworthiness of the vessel or negligence of her owners, the burden is on plaintiff to prove that the vessel was unseaworthy or defendant negligent in the particular alleged, and unless he sustains such burden the court must award defendant judgment or direct a verdict in its favor if the case was tried by a jury: *"The Lydia M. Deering"*, 97 Fed. 971; *"The Edwin"*, 87 Fed. 54; *Bank v. Herbert May Co.*, 298 Fed. 283; *McDonnell v. Oceanic Steam Navigation Co.*, 143 Fed. 480; *"The Columbia"*, 106 Fed. 745; *Johnson v. Fredrick Leyland & Co.*, 153 Fed. 572.

The same is true in actions between master and servant generally, arising out of injuries received by the servant in his employment: *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 45 L. Ed. 361; *James Stewart & Co. v. Newby*, 266 Fed. 287; and in actions brought under the Federal Employer's Liability Act: *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, 62 L. Ed. 1167.

It is submitted that plaintiff entirely failed to sustain such burden in this case. The cause of action was based, as hereinbefore stated, solely on the absence of a nosing, and it was upon plaintiff to prove such absence and that it was the cause of his injury, but the only evidence which plaintiff introduced was that of plaintiff himself, establishing solely the fact that the block fell and hit him. Other than the falling of the block he introduced no evidence whatsoever to show the lack of nosing. The original block which had hit plaintiff was put in evidence and defendant proved in fact that there had been a nosing around its hook. The presence of the nosing at the time the block was painted a few months before it fell was clearly apparent from the absence of paint on the parts of the hook which the nosing had covered. Plaintiff admitted, upon inspecting the hook and block, that there had been a nosing around it and did not attempt to contradict this showing in any manner. Defendant then introduced evidence which tended to show that the real cause of the accident was the fact that plaintiff, in endeavoring to untangle the cargo hook from the midship guy while the cargo booms were being lowered preparatory to sailing, operated the winch so violently that it caused the mast to shake so much that the block, which was thereby jarred out of the eye, fell and hit him. This evidence was corroborated by the chief engineer of the "Crescent City" who, although not an eye-witness to the accident, was in his room only thirty (30) feet away and

testified that he could not help but notice the violent operation of the winch and the consequent shaking of the mast.

The plaintiff denied such negligence but was not corroborated by any other witness. This denial should not be given any weight because plaintiff was in fact hazy as to the circumstances surrounding the occurrence of the accident; for example, he could not remember whether the cargo hook had become entangled with the midship guy, and yet had a dim recollection that some sailor by the name of Delquist offered to go aloft in the rigging and untangle the same (Tr. p. 44); again, although he denied that he was operating the winch at the time the block fell (Tr. p. 43), he finally admitted that his arm was on the winch at the time the block hit him (Tr. p. 56).

It would seem clear that there was no evidence whatever to prove the absence of a nosing across the mouth of the hook in question, and that there was affirmative evidence to show the presence of such a nosing; and further, that the cause of the accident was the plaintiff's own negligence in operating the winch too violently in trying to untangle the cargo hook from the midship guy. Under such circumstances the authorities which will be discussed under "(c)" and "(d)", involving similar situations and comparable facts, seem to establish conclusively that the court should have granted defendant's motion for judgment and that the judgment in favor of plaintiff should be reversed by this court on appeal.

C.

A Review of Cases Involving Injuries to Seamen With Facts Similar or Comparable to the Facts of this Case Compels the Conclusion That Plaintiff Failed to Prove a Cause of Action Herein and Judgment Should Have Been Awarded to Defendant.

"The France", 59 Fed. 479. In this case the handle of an ashbag being hoisted full from the hold, broke, causing the bag to fall 25 feet and strike and injure libelant. The bag was a new one in which no defect had been noticed and had been filled and emptied several times, and the break occurred because of a violent jerk occasioned by the slipping of the chain from the drum of the winch, the cause of which jerk was not shown. The Circuit Court of Appeals reversed the decree in favor of libelant on the ground that there was no showing of negligence on the part of the steamship, and that the court was left wholly to conjecture as to the cause of the accident.

In *Mercurio v. Lunn,* 93 Fed. 592, libelant was injured by the fall of the derrick boom. It was claimed that the accident happened partly because the boom was not fastened safely to the mast. The evidence showed that the boom could not possibly have fallen except for some very extraordinary cause. The decree for libelant was therefore reversed by the Circuit Court of Appeals with instructions to dismiss the libel.

In *Crockett v. Brandt,* 271 Fed. 415, a seaman, while mending a sail with needle and yarn, had his eye pierced by the needle, and alleged that the sail

was so rotten that the needle pierced through it. Judgment for plaintiff in an action at law was reversed by the Circuit Court of Appeals on the ground that there was no evidence to show any negligence on the part of the defendant or unseaworthiness of the vessel, and that the cause of the accident appeared to be the result of plaintiff's own manner of doing his work.

Adams v. Bortz, 279 Fed. 521. This was an action at law by the steward of the steamship "Malden", who had been injured by falling from a temporary stairway, caused by a sudden lurch of the vessel, and was awarded judgment by the lower court. The Circuit Court of Appeals, after reviewing the evidence, held that by a "seaworthy ship" is meant one having equipment and appliances reasonably safe for its purpose, and that since the evidence showed no unseaworthiness under this test, judgment against defendant must be reversed.

It will be noted that the above are cases where the Circuit Court of Appeals has reversed judgments of the lower court in favor of the plaintiff on the ground that the evidence was insufficient to justify a finding of unseaworthiness or negligence against the defendant. The following cases, some in the District Court and some in the Circuit Court of Appeals, in all of which judgment was awarded to defendant in the first instance, are also in point.

"The Henry B. Fiske", 141 Fed. 188 (Dist. Ct. Mass.). In this case a schooner was anchored during a severe gale when a patent spring rider which

held one of the two anchor chains in use, broke, and libelant, who was cleaning the locker, was struck and injured by a chain which had run out from the locker. The rider was made of cast iron, the material ordinarily used, and showed no defect. The appliance was not old, had been made by a reliable manufacturer and had been used under substantially the same strain for several hours and on previous occasions, without breaking. Held that there was no evidence of negligence for which the vessel was liable.

"The Baron Innerdale", 93 Fed. 492 (Dist. Ct. of New York), in which the court in dismissing a libel brought by a stevedore who had been injured by an iron boom which had been released by the breaking of an iron hook which libelant alleged to be of inferior quality and defective, said (p. 493):

> "The burden of proving that the shipowner did not use ordinary care in the selection and maintenance of the hooks is upon the libelant. The evidence produced to fulfill that burden must be sufficiently clear, distinct, and preponderating to convince the court, without resort to conjectures or surmises, that the claimant was negligent. When, after a careful study and consideration of the case, a judge cannot state candidly that his reason is convinced by the weight of evidence that the respondent, in some particular pointed out, has negligently done, or omitted to do, some act, in breach of his duty, the libelant has not fulfilled the burden resting upon him. Courts are required to examine, compare, analyze, infer, weigh, and strike the balance of probabilities; but they are not required to hazard opinions that a person has done wrong, without the

> presentation of intelligible and substantiated facts which tend to establish the accusation. A question of fact may be refined to such a degree that an accurate solution is beyond any reliable intellectual process. At such point of mystification, the court is justified in holding that the libelant has not sustained the burden of proof; that the domain of reasoning has been passed, and that of pure surmise entered."

"The Lydia M. Deering", 97 Fed. 971 (Dist. Ct. Penn.). Libelant was injured by a blow from a rope, to which power was being applied by the vessel's donkey engine in bringing her further into a wharf. Libelant claimed that the accident was due to the fact that a certain block lacked a safety appliance to prevent the rope from slipping, but there was also evidence to show that the hawser first slipped and thus caused the rope to escape from the block. Held that the burden was on libelant to prove his averment, and that having failed to satisfy the court that the same was true, and it appearing that the injury was an accident, the libel must be dismissed.

In *"The Edwin"*, 87 Fed. 540 (Dist. Ct. New York) a longshoreman was struck and injured by the falling of a boom from its crotch, and claimed that the crotch was badly worn and caused the injury. Defendant introduced evidence to show that the crotch was in good condition. The court held that in view of the fact that the burden was on libelant and he had not sustained the same by evidence establishing negligence, and that from

the character of the evidence the injury must have been an accident, the libel must be dismissed.

Burton v. Greig, 265 Fed. 418, affirmed 271 Fed. 271 (Circuit Court, 5th Cir.). In this case a steamship fireman was killed by the blowing out of a copper steam pipe, which had been in use several years, and had given satisfactory and safe service. No latent defect or condition was shown. Held, that the vessel was not liable.

"The Petroline", 271 Fed. 273 (Cir. Ct. 2nd Cir.). Evidence held insufficient to show that injury to seaman by falling of hatch cover on his hand was due to unseaworthiness of the ship in that the stick or block furnished for use to hold up the cover when raised for ventilation, was worn or defective. Stress was laid on the fact that the evidence showed that the plaintiff himself had been manipulating the cover.

See also *Hanrahan v. Pacific Transport Co.,* 262 Fed. 951 (Cir. Ct. 2nd Cir.); *"The Daisy",* 282 Fed. 261 (Cir. Ct. 9th Cir.); *In re Tonawanda Iron & Steel Co.,* 234 Fed. 198 (Dist. Ct. New York); *Schirm v. Dene Steam Shipping Co.,* 222 Fed. 587 (Dist. Ct. New York); *"The Hilarius",* 163 Fed. 421 (Dist. Ct. N. Y.).

We submit that the above cases involve facts and circumstances sufficiently similar to the case at bar as to compel the conclusion that in this case plaintiff has entirely failed to prove a cause of action against the defendant and that the lower court

should have granted defendant's motion for judgment, and that this court should reverse the judgment of the lower court in plaintiff's favor.

D.

It Is a General Rule of Law That Negligence Cannot be Surmised or Conjectured or Left to Speculation From the Happening of an Accident, and That in the Absence of Facts Establishing Negligence the Court Must Award Defendant Judgment. This Rule Is Directly Applicable to This Case.

In *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 45 L. Ed. 361, it is said:

> "The fact of accident carried with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co. v. Barrett,* 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident

justifies any departure from settled rules of proof resting upon all plaintiffs."

In *Southern Railway Co. v. Derr,* 240 Fed. 73 (Cir. Ct. 6th Cir.), it is said (p. 75):

> " * * * and the case may not be submitted to the jury where there is at the most only a balanced probability that the actionable negligence existed."

The Circuit Court of Appeals for the Eighth Circuit, in *Armour & Co. v. Harcrow,* 217 Fed. 224, stated this rule as follows (p. 228):

> "And where the evidence leaves the issue, whether or not an injury was caused by an act of negligence, to speculation, without substantial evidence to sustain the averment that it was, it is the duty of the court to instruct the jury to return a verdict for the defendant."

The same court said, in *Midland Valley R. Co. v. Fulgham,* 181 Fed. 91 (p. 95):

> "Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action in this case of the alleged defect in the lift pen lever and the coupler, is indispensable to the maintenance of a verdict sustaining it."

In *Payne v. Bucher,* 270 Fed. 38 (Cir. Ct. 3rd Cir.), it is said (p. 40):

> "The fact of accident carries with it neither proof nor presumption of negligence on the part of the employer. Negligence of the em-

> ployer is an affirmative fact to be established by the one speaking for the deceased employee. (Citing cases.) Evidence that the employer may have been guilty of negligence is not sufficient."

So, likewise, in *Peirce v. Kile,* 80 Fed. 865 (Cir. Ct. 7th Cir.), it is said (p. 867):

> "The inference of negligence cannot be established by conjecture or speculation or drawn from a presumption but must be founded upon some established fact."

It should be noted that in all of the above cases a judgment in favor of the plaintiff was reversed on appeal by the Circuit Court of Appeals.

We submit that the doctrine of these cases is directly applicable to the case at bar, and that there is in this case no evidence of negligence whatsoever, and that negligence on the part of the defendant could only be conjectured or surmised or speculated upon. That the block actually fell and hit plaintiff is not sufficient; for in each of the above cases, just as in this one, there was an accident causing injury to the plaintiff, but the Circuit Court of Appeals nevertheless held in each instance that the evidence showed no negligence on the part of the defendant, and reversed the lower court's judgment in favor of plaintiff. So here the judgment in plaintiff's favor should be reversed for the same reason.

E.

Plaintiff Cannot Claim Herein the Benefit of the Doctrine of Res Ipsa Loquitur Because it is Ordinarily Not Applicable in Actions by Seamen for Injuries Received on Account of the Unseaworthiness of the Vessel or the Negligence of the Owners, or in Cases of Master and Servant Generally, and Even If the Doctrine Could Apply it Would Not Apply in This Case as Defendant Introduced Evidence Explaining the Cause of the Accident Which Evidence Was Not Overcome by Plaintiff.

At the trial plaintiff contended that the doctrine of *res ipsa loquitur* was applicable to this case, and was sufficient to support his cause of action. The lower court, in its opinion, agreed with this contention of plaintiff (Tr. p. 16). A review of the authorities shows that this was error. The following cases hold directly that in an action between master and servant, brought by the servant to recover damages from the master for injuries received in the former's employment, the doctrine of *res ipsa loquitur* is not applicable. *McDonnell v. Oceanic Steam Navigation Co.,* 143 Fed. 480 (Cir. Ct. 2nd Cir.); *"The Baron Innerdale",* 93 Fed. 492 (Dist. Ct. N. Y.); *Armour & Co. v. Harcrow,* 217 Fed. 224 (Cir. Ct. 8th Cir.); *Payne v. Bucher,* 270 Fed. 38 (Cir. Ct. 3rd Cir.); *Chicago & N. W. Ry. Co. v. O'Brien,* 132 Fed. 593 (Cir. Ct. 8th Cir.); *Northern Pacific Ry. Co. v. Dixon,* 139 Fed. 737 (Cir. Ct. 8th Cir.); *Midland Valley R. Co. v. Fulgham,* 181 Fed. 91 (Cir. Ct. 8th Cir.); *Cryder v. Chicago Ry. Co.,* 152 Fed. 417 (Cir. Ct. 8th Cir.).

This principle is sometimes expressed in another way, to the effect that in actions between employer

and employee the fact of the accident raises no presumption of negligence on the part of the employer, and the burden is on the employee, notwithstanding the accident, to prove that the employer was guilty of negligence which caused the injury. *Patton v. Texas & Pacific Ry. Co.,* 179 U. S. 658, 45 L. Ed. 361; *Peirce v. Kile,* 80 Fed. 865 (Cir. Ct. 7th Cir.); *Canadian Northern Ry. Co. v. Senske,* 201 Fed. 637 (Cir. Ct. 8th Cir.); *James Stewart & Co. v. Newby,* 266 Fed. 287 (Cir. Ct. 4th Cir.).

It is true that in a very extreme case the doctrine of *res ipsa loquitur* has even been applied between master and servant, but the courts have made it clear that the doctrine is never to be invoked where there is a possible explanation of the accident or where the accident may be the result of one of several causes or where the evidence is conflicting as to the cause of the accident. Thus in *Lucid v. E. I. Du Pont De Nemours Powder Company,* 199 Fed. 377, this Circuit Court of Appeals did apply the doctrine in an action between master and servant, but in so doing the court recognized the general rule, saying through Gilbert, J.,

> "The doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, *and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others.*"

In that case the complaint alleged that plaintiff was injured by reason of the fact that defendant

had negligently stored dynamite and other high explosives, which subsequently exploded. The case came up on a judgment sustaining defendant's demurrer to the complaint. The facts in the complaint had to be taken as true, therefore, and the explosion of high explosives from negligent storage, in the absence of any evidence explaining the same, naturally presented an extreme state of facts justifying the application of the doctrine of *res ipsa loquitur*.

Likewise in *Central R. Co. of N. J. v. Peluso,* 286 Fed. 661 (Cir. Ct. 2nd Cir.), the doctrine was applied between master and servant, but the court made its position very clear as to when it considered *res ipsa loquitur* was to be applied, by making the following quotations from other cases, to wit:

McLoughlin, J., in *Francey v. Rutland R. R. Co.,* 222 N. Y. 482, 119 N. E. 86:

> "The action was tried and submitted to the jury on an erroneous theory as to the application of the rule of *res ipsa loquitur*. It is not a complicated rule, nor is there difficulty in applying it in a given case, when the reason for its adoption is understood. The phrase usually employed to express the rule, *res ipsa loquitur*—the thing speaks for itself—may at times tend to obscure rather than to make clear what the rule means. All that is meant is that the circumstances involved in or connected with an accident are of such an unusual character as to justify, *in the absence of any other evidence bearing upon the subject,* the inference that the accident was due to the negligence of the one having possession or control of the article or thing which caused the injury. This

inference is not drawn merely because the thing speaks for itself, but because all of the circumstances surrounding the accident are of such a character that *unless an explanation be given* the only fair and reasonable conclusion is that the accident was due to some omission of defendant's duty."

Justice Holmes, in *Southern Railway v. Bennett,* 233 U. S. 80, 85, 34 Sup. Ct. 566, 567 (58 L. Ed. 860):

"Of course the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that if the death was due to a defective instrumentality *and no explanation was given,* the plaintiff had sustained the burden. The instruction is criticized further as if the judge had said *res ipsa loquitur*—which would have been right or wrong according to the *res* referred to."

Justice Pitney in *Sweeney v. Erving,* 228 U. S. 233, 33 Sup. Ct. 416 (57 L. Ed. 815):

"The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed, by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for

> itself—*that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened,* it may fairly be found to have been occasioned by negligence."

In the present case there is evidence to explain the accident, to wit, that it was caused by the plaintiff himself in operating too violently the winch in order to untangle the cargo hook from the midship guy. Under such circumstances the cases last cited establish conclusively that the doctrine of *res ipsa loquitur* is not to be applied.

In conclusion we respectfully submit that:

1. Plaintiff's cause of action rested solely on the alleged absence of nosing across the mouth of the hook on the block which fell and hit plaintiff.

2. The burden of proof was on plaintiff to show such lack of nosing, and that it was the cause of his injury. Plaintiff introduced no evidence to prove the same, other than the happening of the accident. On the other hand defendant introduced evidence which tended to show that there was in fact the required nosing and further that the block was caused to fall and hit plaintiff by reason of his own negligence in operating too violently the winch in order to untangle the cargo hook from the midship guy. Plaintiff therefore failed to sustain the burden of proof.

3. In this case there is no presumption of negligence from the happening of the accident, and the doctrine of *res ipsa loquitur* is not applicable.

4. A review of cases involving injuries to seamen with facts similar or comparable to the facts of this case compels the conclusion that plaintiff herein failed to prove a cause of action against defendant and the court should have granted defendant's motion for judgment in its favor.

5. Negligence cannot be conjectured, surmised or left to speculation from the happening of the accident, and if there is no substantial fact showing negligence, there should be judgment for defendant, and if plaintiff is awarded judgment under such circumstances, the Circuit Court of Appeals will reverse the same.

6. Because of all of the foregoing the judgment appealed from herein should be reversed.

Dated, San Francisco,
October 11, 1924.

Respectfully submitted,

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ESMOND SCHAPIRO,
Of Counsel.